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FEDERAL VENUE AND THE CORPORATE PLAINTIFF

I

In federal diversity of citizenship jurisdiction litigation three requirements must be met before adjudication on the merits is proper. The parties to the litigation must be "citizens of different states,"¹ the federal court where suit is initiated must have personal jurisdiction of the defendant and venue must be proper.² While the parties cannot, by consent, confer the diversity of citizenship jurisdictional requirement on a court, both personal jurisdiction and proper venue are personal privileges which the defendant can waive.³ Since these requirements have been traditionally framed in concepts more easily applicable to natural persons than to corporations, the corporate party in diversity litigation has presented unique jurisdiction and venue problems.

The contemporary corporate problem is presented by the general

1. U.S. CONST. ART. III, § 2. Congress has often exercised its power to limit the diversity jurisdiction powers expressed in the Constitution. The present limitation on diversity jurisdiction requires that ". . . the matter in controversy exceeds the sum of value of \$10,000, exclusive of interest and costs." 28 U.S.C. § 1332(a) (1958). A further limitation has been placed on diversity jurisdiction litigation where a corporation is a party to the litigation. Congress has provided that ". . . a corporation shall be deemed a citizen of any State where it has its principal place of business." 28 U.S.C. § 1332(c) (1958). For a more thorough discussion of the background of § 1332(c) see 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 26, 142, n.93.1 (1960).

2. See BARRON & HOLTZOFF, *op. cit. supra* note 1, §§ 26, 71, 172; 1 MOORE, *FEDERAL PRACTICE* § 0.140 [1.-1], 1317 (2nd ed. 1960).

3. ". . . [T]he following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue. . . . A motion making . . . these defenses shall be made before pleading. . . ." FED. R. CIV. P. 12(b). "A party waives all defenses and objections which he does not present . . . by motion . . . except (1) that the defense of failure to state a claim upon which relief can be granted . . . [is not waived] . . . and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." FED. R. CIV. P. 12(h).

corporate venue provision, section 1391(c) of the Judiciary and Judicial Procedure Code of 1948, which provides that:

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business and such judicial district shall be regarded as the residence of such corporation for venue purposes.⁴

It is obvious that standing alone the first clause of section 1391(c), providing that "a corporation *may be sued* in any judicial district in which it is incorporated or licensed to do business or is doing business . . ."⁵ would be limited to defendant corporations by the words *may be sued*. It was contended, however, that the second clause of section 1391(c), providing that the three venue options of the first clause ". . . shall be regarded as the residence of such corporation for venue purposes,"⁶ made the three venue options the definition of corporate residence, equally applicable to plaintiff and defendant corporations and thus eliminated the restriction of the words *may be sued*. While a number of district courts have accepted this construction of the latent ambiguity of section 1391(c) and have allowed plaintiff corporations to lay venue in districts in which they are licensed to do business or are doing business,⁷ three district courts have rejected the contention.⁸ This plaintiff corporate venue contention has not yet been decided by the Supreme Court, but there is a strong case for a ruling that Section 1391(c) establishes a new definition of plaintiff corporation residence, thus increasing its venue options.

II

While the section 1391(c) plaintiff corporate venue problem is the main area of contemporary difficulty, the earliest problem was a judicial unwillingness to consider a corporation a citizen within the meaning of the Constitution's jurisdictional provision.⁹ Only after more than fifty

4. 28 U.S.C. § 1391(c) (1958).

5. *Ibid.*

6. *Ibid.*

7. See *Travelers Ins. Co. v. Williams*, 164 F. Supp. 566 (W.D.N.C. 1958) *aff'd* 265 F.2d 531 (4th Cir. 1959); *Standard Ins. Co. v. Isbell*, 143 F. Supp. 910 (E.D. Tex. 1956); *Eastern Motor Exp., Inc. v. Espenshade*, 138 F. Supp. 426 (E.D. Pa. 1956); *Southern Paperboard Corp. v. United States*, 127 F. Supp. 649 (S.D.N.Y. 1955); *Ralston Purina Co. v. United States*, 1952 Am. Mar. Cas. 1496 (E.D. La. 1952); *Hadden v. Barrow, Wade, Guthrie & Co.*, 105 F. Supp. 530 (N.D. Ohio 1952); *Freiday v. Cowdin*, 83 F. Supp. 516 (S.D.N.Y. 1949), *appeal dismissed* 177 F.2d 1020 (2nd Cir. 1949).

8. See *Nebraska-Iowa Bridge Corp. v. United States*, 158 F. Supp. 796 (D. Neb. 1958); *Albright & Friel, Inc. v. United States*, 142 F. Supp. 607 (E.D. Pa. 1956); *Chicago & N.W. Ry. v. Davenport*, 94 F. Supp. 83 (S.D. Ia. 1950), *order vacated* 95 F. Supp. 469 (S.D. Ia. 1951).

9. See *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809); *Hope Ins. Co. v. Boardman*, 9 U.S. (5 Cranch) 57 (1809).

years of litigation did the Supreme Court decide that a corporation was a citizen of its incorporating state, thereby giving it status as a legal entity so that it could sue and be sued in its own right in the federal courts.¹⁰ Having established that a corporation was a citizen of its incorporating state, the *Bank of Augusta v. Earle*¹¹ proposition, that a corporation “. . . must dwell in the place of its creation and cannot migrate to another sovereignty,”¹² was extended to limit corporate venue to the state of incorporation.¹³ The corporation, however, was not limited by state boundaries in its economic activities, and, therefore, the corporate venue limitation artificially and unsatisfactorily denied the corporation its unique attribute of simultaneous multiple state operation.

In the late 19th century the effect of limited corporate venue was lessened by *Ex Parte Schollenberger*¹⁴ in which the Supreme Court resorted to a doctrine of waiver. The Court held that a foreign corporation's compliance with a state statute, conditioning its privilege to do business within the state on appointment of an agent to receive service of process, constituted a waiver of the objection to improper venue.¹⁵ Although the Court emphasized that the corporation had actually “consented to be sued,” the doctrine was short-lived. In dicta, in *Southern Pacific Co. v. Denton*¹⁶ the Court reasoned that the *Ex Parte Schollenberger* decision was grounded upon the venue provision in effect at the time of that decision. That venue provision had allowed a defendant to be sued in any district where he was *found*.¹⁷ The Court reasoned that the corporation by appointing an agent to receive service of process had not “consented to be sued,” but merely had “consented to be found” outside of its state of incorporation, thereby coming under the venue provision rather than waiving an objection to venue which was improper under the applicable provision.¹⁸ The Court concluded that the elimina-

10. It was conclusively presumed that the stockholders were citizens of the corporation's incorporating state, when in fact some stockholders were citizens of other states. *Louisville, Cinn. & Charleston R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844). The fiction made it no longer necessary for the stockholders to appear in the pleading as the parties to the proceedings. See *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933); *St. Louis & S.F. Ry. v. James*, 161 U.S. 545 (1896); *Covington Drawbridge Co. v. Shepherd*, 61 U.S. (20 How.) 227 (1857); *Marshall v. Baltimore & O. R.R.*, 57 U.S. (16 How.) 227 (1844).

11. 38 U.S. (13 Pet.) 519 (1839).

12. *Id.* at 558.

13. See *Neirbo v. Bethlehem Shipbuilding Co.*, 308 U.S. 165, 169 (1939).

14. 96 U.S. 369 (1877).

15. *Id.* at 378.

16. 146 U.S. 202, 207 (1892).

17. The venue provision allowed a defendant to be sued in the “. . . district . . . whereof he is an inhabitant or in which he shall be found. . . .” Judiciary Act of 1875, 18 Stat. 470 (1875).

18. *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892).

tion in the Judiciary Act of 1887,¹⁹ as corrected by the Judiciary Act of 1888,²⁰ of the venue option that allowed a defendant to be sued where *found* acted as a proviso to limit venue to incorporating states.

With three exceptions,²¹ this dicta was followed by the lower federal courts until 1939. Then, in *Neirbo v. Bethlehem Shipbuilding Co.*²² the Supreme Court held that a corporation complying with a state statute requiring appointment of an agent to receive service of process had "consented to be sued" in a federal court sitting within the state, thereby waiving its objection to improper venue. In reaching the decision the Court emphasized that the change in the venue provision of the Judiciary Act of 1887 as corrected by the Judiciary Act of 1888 was not pertinent to the holding, since the question before the Court was one of waiver of objections to improper venue, rather than a question of corporate residence under the applicable venue provision.²³

Although the *Neirbo* waiver doctrine diminished the impact of limited corporate venue, it was in no way a complete solution to defendant corporate venue problems. Since the waiver doctrine was based upon actual consent by compliance with a state foreign corporation licensing statute, a corporation that did not comply with the licensing statute by appointing an agent to receive service of process would not be amenable to suit in the federal courts within the state unless the plaintiffs were residents of the state.

With only the *Neirbo* waiver doctrine disturbing the traditional holding that corporate venue was proper only in a corporation's state of incorporation,²⁴ Congress expanded corporate venue in section 1391(c) of

19. 24 Stat. 552 (1887). The venue provision read ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of either the plaintiff or the defendant."

20. 25 Stat. 434 (1888). The corrections to the Judiciary Act of 1887 are not relevant to the diversity venue provision.

21. See Levin, *Federal Venue in Actions Against Corporations*, 15 TEMP. L.Q. 92, 97 (1940). One court held that the appointment of an agent to receive service of process was consent to be sued in a court sitting within the boundaries of the state. *Shainwald v. Davids*, 69 Fed. 704 (N.D. Cal. 1895). One court held that appointment of an agent to receive service of process constituted consent to be an inhabitant of a non-incorporating state, and while a corporation could never be a citizen of the state, the venue requirements were fulfilled. *Patten v. Dodge Mfg. Co.*, 25 F.2d 852 (D. Ind. 1928), *rev'd on other grounds* 60 F.2d 676 (7th Cir. 1932). One court held that a state statute providing that a corporation must appoint an agent to receive service of process in any action against the corporation went beyond the state statutes upon which the Supreme Court had previously spoken and included federal courts sitting within the state. *Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co.*, 100 F.2d 770 (10th Cir. 1938).

22. 308 U.S. 165 (1939).

23. *Id.* at 172.

24. See *Suttle v. Reich Bros. Const. Co.*, 333 U.S. 163 (1948); *In re Keasbey and Mattison Co.*, 160 U.S. 221 (1895); *Shaw v. Quincy Mining Co.*, 145 U.S. 444 (1892). For a complete list of cases holding that a corporation's residence for venue purposes is its incorporating state see *Suttle v. Reich Bros. Const. Co.*, *supra*, at 166, n. 7.

the Judiciary and Judicial Procedure Code of 1948. The *Neirbo* waiver doctrine was enacted into section 1391(c) by allowing corporations to be sued where they are licensed to do business, and Congress eliminated the effect of corporate non-compliance with a state's foreign corporation licensing statute by making corporations amenable to suit in districts where they are doing business. In addition to these two obvious results Congress created the latent ambiguity of section 1391(c) that makes the section susceptible to an interpretation allowing plaintiff corporations to sue where they are incorporated, licensed to do business or are doing business.

III

Section 1391(c) as a definition of plaintiff corporation residence was first in issue in *Freiday v. Cowdin*.²⁵ The plaintiff stockholder, over the defendant's objection, successfully laid venue in a derivative stockholders action in New York, where his Delaware corporation was doing business. With little authority,²⁶ the court found a congressional intent to deal comprehensively with venue provisions and based its decision on two grounds. First, the court, assuming that section 1391(c) at least contained a definition of defendant corporation residence, stated that if the definition was not applicable to a plaintiff corporation there would be no definition of its residence in any other part of the 1948 Code revision.²⁷ The second reason for the decision was based on the court's feeling that a contrary result would have the inequitable effect of making a corporation amenable to suit in a district in which it could not lay proper venue as a plaintiff, unless all the defendants were residents of the district.²⁸ While six other district court decisions have adopted the *Freiday* multi-venue option position,²⁹ only *Hadden v. Barrow, Wade, Guthrie & Co.*³⁰ has offered additional support. The *Hadden* court reasoned that Congress clearly indicated in the first clause of section 1391(c) that the multiple venue options applied only to defendant corporations, thereby making the second clause of section 1391(c) unnecessary unless Congress intended that the three venue options be a definition of corporate

25. 83 F. Supp. 516 (S.D.N.Y. 1949).

26. The *Freiday* case cites only two authorities for its position on § 1391(c); a law review note that concludes that § 1391(c) applies to plaintiff corporations, Note 60 HARV. L. REV. 424, 435 (1947); and a statement that § 1391(c) "... changes the . . . practice, under which a corporation was a resident of one district." 3 MOORE, FEDERAL PRACTICE § 19.04, 2142 (2nd ed. 1948). It appears that Professor Moore did not intend the latter statement to apply to plaintiff corporations. See 1 MOORE, *op. cit. supra* note 2, § 0.142 [5.-3], at 1503.

27. *Freiday v. Cowdin*, 83 F. Supp. 516, 518 (S.D.N.Y. 1949).

28. *Ibid.*

29. See cases cited note 7 *supra*.

30. 105 F. Supp. 530 (N.D. Ohio 1952).

resident. It was further reasoned that as a definition section 1391(c) must apply equally to plaintiff and defendant corporations, since a contrary result would make the second clause of section 1391(c) redundant. The court then concluded that it must give effect to the definition, since a court cannot overlook congressional language unless it is apparent that it contains superfluous words or expressions.³¹

The first case to reject the *Freiday* multi-venue option position was *Chicago & N.W. Ry. v. Davenport*.³² The defendant, a resident of Texas, objected to the Wisconsin plaintiff corporation laying venue in Iowa, where it was doing business. In sustaining the defendant's motion to dismiss the court emphasized that in the past Congress had seemed satisfied with the limitation of corporate venue to the corporation's state of incorporation. From this it was concluded that to make the drastic change favored by the *Freiday* multi-venue option position there would have to be a clear expression of such a congressional intention in the language or legislative history of section 1391(c).³³ Since the *Davenport* decision four other district courts faced with corporate plaintiffs attempting to lay venue outside their state of incorporation in districts in which they were licensed to do business or were doing business have either adopted the *Davenport* single venue option position³⁴ or have held venue improper on other grounds.³⁵ In *United Merchants & Mfrs. Co. v. United States*³⁶ the plaintiff corporation brought an action outside its state of incorporation in a district in which it was licensed to do business to recover a tax paid for documentary stamps. Venue was held improper on the grounds that (1) section 1391(c) could not be read in conjunction with the special venue provision applicable to stamp tax recovery actions and (2) the special venue read alone limited venue for corporate tax recovery to the corporation's state of incorporation.³⁷ The court, however, severe-

31. *Id.* at 531.

32. 94 F. Supp. 83 (S.D. Ia. 1950).

33. *Id.* at 85.

34. *Nebraska-Iowa Bridge Corp. v. United States*, 158 F. Supp. 796 (D. Neb. 1958); *Albright & Friel, Inc. v. United States*, 142 F. Supp. 607 (E.D. Pa. 1956).

35. *United Transit Co. v. United States*, 158 F. Supp. 856 (M.D. Tenn. 1957); *United Merchants & Mfr., Inc. v. United States*, 123 F. Supp. 435 (M.D. Ga. 1954). These district courts held that § 1391(c) was only applicable to diversity jurisdiction litigation and, therefore, could not be read in conjunction with a federal question venue provision.

36. *Supra* note 35.

37. The special venue provision that the plaintiff was attempting to have read in conjunction with § 1391(c) provided that a corporate tax refund action could be brought "... only in the judicial district where the plaintiff resides." Judicial Code and Judiciary Act of 1948 ch. 646, 62 Stat. 937 (1948). It was held that the language of the special venue provision precluded the "... possibility that Congress intended that a plaintiff could sue the United States in more than one district." *United Merchants & Mfr., Inc. v. United States*, 123 F. Supp. 435, 438 (M.D. Ga. 1954). See *Albright & Friel, Inc. v. United States*, 142 F. Supp. 607 (E.D. Pa. 1956); *United Transit Co. v.*

ly criticized the *Freiday* multi-venue option position. Since the *Freiday* multi-venue option position was based on the argument that section 1391(c) contains a new definition of corporate residence, it was argued that as a necessary antecedent to a new definition of plaintiff corporate residence it must be shown that section 1391(c) contains at least a new definition of defendant corporate residence. The court implied that the traditional definition of a corporation's residence as its state of incorporation was unchanged by section 1391(c). It then reasoned that by allowing a corporation to be amenable to suit where it is licensed to do business or is doing business, Congress created an exception to its general rule that a diversity jurisdiction defendant is amenable to suit only in a district in which all the plaintiffs or defendants reside. The court concluded that Congress recognized this exception and added the second clause of section 1391(c) to say that even though a corporation could be sued in districts in which it did not reside, the districts should be treated by courts as if they were the residence of the corporation.³⁸ To supplement its main criticism of the *Freiday* multi-venue option position the court also argued that if Congress intended to allow a corporation to sue where it was incorporated, licensed to do business or was doing business, it could have easily manifested the intention by having section 1391(c) read "a corporation *may sue* or be sued, etc."³⁹

A stronger argument for the *Davenport* single venue option position is advanced in *Albright & Friel, Inc. v. United States*⁴⁰ and elaborated in *Nebraska-Iowa Bridge Corp. v. United States*.⁴¹ The latter decision recog-

United States, 158 F. Supp. 856 (M.D. Tenn. 1957); *contra*, *Southern Paperboard Corp. v. United States*, 127 F. Supp. 649 (S.D.N.Y. 1955). Congress has amended the special venue provision available to corporations in tax refund actions and allows a corporation to bring action in a judicial district ". . . in which is located the principal place of business or principal office or agency of the corporation; or if it has no principal place of business or principal office or agency in any judicial district (A) in the judicial district in which is located the office to which was made the return of the tax in respect of which the claim is made. . . ." 28 U.S.C. § 1402(a)(2) (1958). For the legislative history of the act, see U.S. CODE CONG. & ADM. NEWS 5263 (1958). Although the *United Merchants & Mfr.* holding has been superseded by Congress it seems that, if § 1391(c) creates a new definition of plaintiff corporate residence, the court violated the rules of consistency in legislative drafting. The rules encourage a legislative draftsman to use the same words to refer to the same thing, and to change his words to refer to different things. See PIESSE & SMITH, *THE ELEMENTS OF LEGISLATIVE DRAFTING* 32 (2nd ed. 1958); DICKERSON, *LEGISLATIVE DRAFTING* § 6.2(b), 62 (1954); 2 SUTHERLAND, *STATUTORY CONSTRUCTION* § 4970, 392 (Horack 3rd ed. 1943). *But cf.*, *Fourco Glass Co. v. Transmirra Prod. Corp.*, 353 U.S. 222 (1957). The *United Merchants & Mfr.* holding also violates the often suggested principle that legislatures should always draft statutes in terms of the singular rather than the plural, for the singular will correctly encompass the plural. See DICKERSON, *op. cit. supra* § 6.9, at 67; 2 SUTHERLAND, *op. cit. supra* § 4907, at 392.

38. *United Merchants & Mfr., Inc. v. United States*, *supra* note 37, at 438.

39. *Ibid.*

40. 142 F. Supp. 607 (E.D. Pa. 1956).

41. 158 F. Supp. 796 (D. Neb. 1958).

nized the anomalous result of the *Davenport* single venue option position, which fails to treat plaintiff and defendant corporations equally. The court stated, however, that it must look at the restrictive nature of the word "such" modifying corporation in the second clause of section 1391(c). The second clause provides that the three venue options of the first clause of section 1391(c) ". . . shall be regarded as the residence of *such* corporation for venue purposes."⁴² The court concluded that as a matter of syntax "such corporation" can refer only to the corporation previously mentioned in section 1391(c), that corporation being a defendant corporation because of the limitation of the words "may be sued" in the first clause of section 1391(c).⁴³

Since conflicting methods of statutory construction account for the opposing lines of authority regarding section 1391(c), analysis of the merits of these methods is relevant. As has been indicated, in *United Merchants & Mfrs. Co. v. United States*⁴⁴ it was contended that section 1391(c) did not create a new definition of either plaintiff or defendant corporate residence. It was implied that the definition of corporate residence was a corporation's state of incorporation. It seems, however, that proper weight was not given to the word "as" in the second clause of section 1391(c), which designates that the three venue options ". . . shall be regarded *as* the residence of such corporation. . . ."⁴⁵ In affect, to reach the *United Merchants & Mfrs.* conclusion that section 1391(c) was not a definition of corporate resident, it was necessary to judicially change the word "as" to *like*. Only then can a court destroy the fact that "shall be regarded as" indicates an intention to create a definition. The court also made surplusage of the word "incorporated" in the venue options of the first phrase of section 1391(c); for if the only definition of corporate residence after section 1391(c) is still an incorporating state, to refer to the definition as *like* corporate residence is redundant. Giving equal weight to all parts of section 1391(c) it could be contended that the section at least creates a new definition of defendant corporate residence.

Accepting the conclusion that section 1391(c) contains at least a new definition of defendant corporate residence, the issue then becomes the applicability of that definition to plaintiff corporations. The only plausible ground for accepting the *Davenport* single venue option position is based on the use of the word "such" modifying corporation to restrict the definition of the second clause of section 1391(c) to a de-

42. 28 U.S.C. § 1391(c) (1958).

43. *Nebraska-Iowa Bridge Corp. v. United States*, 158 F. Supp. 796, 797 (D. Neb. 1958).

44. 123 F. Supp. 435, 438 (M.D. Ga. 1954).

45. 28 U.S.C. § 1391(c) (1958).

fendant corporation. While legislatures use *such* as a demonstrative adjective to refer to a previously identified person or thing, the facts that this legislative device (1) is improper under general drafting standards⁴⁶ and (2) has not been uniformly accepted in other English speaking jurisdictions,⁴⁷ weaken the argument that section 1391(c) applies only to defendant corporations. While authority for refusing to use *such* as a demonstrative adjective is not strong, it can be used by a court to obtain two desirable ends. First, the authority shows that the *Freiday* multi-venue option position can be judicially obtained, and, second, it allows a court to warn Congress that if an enactment is to be restricted in some manner the restriction must be grammatically correct to eliminate guesswork in statutory construction.

Often, when the language of a congressional enactment is susceptible to more than one interpretation, a court can correctly construe the provision by seeking a manifestation of congressional intent in the legislative history of the enactment. In the legislative history of section 1391(c), however, it is apparent only that the section invoked no congressional debate.⁴⁸ Even if section 1391(c) only expanded the definition of defendant corporate venue, this expansion is not necessarily a "minor change"⁴⁹ or a "non-controversial change."⁵⁰ Therefore, it would seem that the congressional silence is inconclusive and there is no manifest intent that would prevent plaintiff corporations from laying proper venue outside their states of incorporation in districts where they are licensed to do business or are doing business. To reach a contrary conclusion a court would have to attribute to Congress an illogical intent. In effect,

46. See, DICKERSON, *op. cit. supra* note 37 § 7.6, at 82.

47. See PIESSE & SMITH, *op. cit. supra* note 37, at 52.

48. Professor Moore in testifying on venue said, "Venue provisions have not been altered by the revision. Two changes of importance have, however, been made. Improper venue is no longer a grounds for dismissal . . . [a]nd Section 1404 . . . gives the court power to transfer a case. . . ." *Hearings before Subcommittee No. 1 of the Committee on the Judiciary on H.R. 1600 and H.R. 2055*, 80th Cong., 1st Sess. 29 (1947). In referring to venue it was stated ". . . minor changes were made in the provision regulating the venue of district courts in order to clarify ambiguities or to reconcile conflicts. These are reflected in the revisor's notes under sections 1391-1406." H.R. REP. No. 308, 80th Cong., 1st Sess. 6 (1948). The Reviser's Note on § 1391(c) reads: In subsection (c), references to defendants "found" within a district or voluntarily appearing were omitted. The use of the word "found" made section 111 of title 28 U.S.C., 1940 ed., ambiguous. The argument that an action could be brought in the district where one defendant resided and a non-resident defendant was "found" was rejected in *Camp v. Gress*, 1919, 39 S. Ct. 478, 250 U.S. 308, 63 L. Ed. 997. However, this ambiguity will be obviated in the future by omission of such reference.

Reviser's Notes, following 28 U.S.C. § 1391 (1958). On the floor of the Senate it was said ". . . the purpose of this bill is primarily to revise and codify and to enact into positive law, with such corrections as were deemed by the committee to be of substantial and non-controversial nature." 94 CONG. REC. 7928 (remarks of Senator Donnell).

49. See note 48 *supra*.

50. *Ibid.*

it would have to be held that Congress changed one half of the traditional definition that limited plaintiff-defendant corporate residence to the corporation's state of incorporation and did not consider it necessary to clarify plaintiff corporate residence at all in the Judiciary and Judicial Procedure Code of 1948.

Since section 1391(c) is susceptible to diverse interpretations, it seems proper for a court to look beyond the rules of statutory construction and consider the effects of the *Freiday* multi-venue option position and the *Davenport* single venue option position. When consideration is given to the effects of the contrary positions, it appears that there are several factors which make the *Freiday* multi-venue option position the most desirable interpretation of section 1391(c).⁵¹

IV

Since the inception of diversity jurisdiction, Congress has, with one exception in the late 1800's,⁵² considered it important to offer venue options that treat plaintiffs and defendants equally. Even in conception, the purported reasons for establishing diversity jurisdiction, although primarily concerned with natural persons, were based on equal plaintiff-defendant treatment⁵³ and may well afford the basis of the congressional equal venue option policy. If the *Freiday* multi-venue option position is rejected, a court will be destroying this continuous congressional policy.

The first venue provision in the Judiciary Act of 1789 allowed a de-

51. There has been a definite conflict as to the desirability of the *Freiday* multi-venue option position on § 1391(c). For authorities supporting the *Freiday* multi-venue option position see 1 BARRON & HOLTZOFF, *op. cit. supra* note 1 § 80, at 388; Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 240, n. 126 (1948); Note, 60 HARV. L. REV. 424, 435 (1947); Note, *Federal Venue and the Corporate Plaintiff: Judicial Code Section 1391(c)*, 28 IND. L.J. 256 (1953); *contra*, 1 MOORE, *op. cit. supra* note 2, § 0.142[5-3], at 1503; MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE § 0.03(28), 178 (1949); 1-A OHLINGER, FEDERAL PRACTICE 279 (1950); Comment, *The Corporate Plaintiff and Venue Under Section 1391(c) of the Judicial Code*, 28 U. CHI. L. REV. 112 (1960); 51 MICH. L. REV. 440 (1953); 1 VILL. L. REV. 355 (1956).

52. At one time it was possible to lay proper diversity jurisdiction venue in any district in which the defendant could be found. See Judiciary Act of 1875, 18 Stat. 470 (1875).

53. Although there are no specific instances to support the contention, one purported reason for diversity jurisdiction was to prevent state courts from discriminating against non-residents. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 494 (1928). More persuasive reasons for establishing diversity jurisdiction are presented by the hopes that: (1) the federal courts would protect non-resident creditors against the favorable debtor legislation in some states, (2) the widespread legislative control of the appointment and tenure of judges would not be used to discriminate against non-residents and (3) the unique situation that made Connecticut's legislature also its Supreme Court would not be used to discriminate against non-residents. Friendly, *supra* at 496.

fendant to be sued wherever he was found,⁵⁴ but by a jurisdictional limitation Congress effectively limited diversity venue to either the plaintiff's or defendant's residence.⁵⁵ The only deviation in this policy came about in the Judiciary Act of 1875 when Congress removed the above jurisdictional limitation⁵⁶ and left the venue provision unchanged.⁵⁷ Allowing venue to be laid wherever the defendant could be found quickly proved unsatisfactory, since it was considered inequitable to make a defendant subject to suit anywhere he could be found.⁵⁸ Therefore, in the Judiciary Act of 1887 as corrected by the Judiciary Act of 1888 a specific diversity jurisdiction venue provision was enacted which reinstated venue in either the plaintiff's or defendant's residence.⁵⁹ In commenting on the proposed venue change Senator Hoar said that a plaintiff should initially be able to lay proper venue in his own residence. The Senator reasoned that otherwise a defendant who came into the plaintiff's district would be amenable to suit only in the state court and have the only option to remove the cause to the federal courts.⁶⁰ The equal venue option policy continued and was incorporated into the Judiciary and Judicial Procedure Code of 1948.⁶¹

If the *Davenport* single venue option position is accepted, a corporation, while being amenable to suit in districts where it is licensed to do business or is doing business, will be unable as a plaintiff to lay proper venue in those same districts, unless all the defendants are residents of the district.⁶² Thus, the *Davenport* single venue option position destroys the equal venue treatment previously afforded plaintiff and defendant corporations. It can be argued that there is no equality of venue options if a corporate plaintiff can sue a natural person outside its incorporating

54. The venue provision allowed a defendant to be sued in a district ". . . whereof he is an inhabitant, or in which he shall be found at the time of the serving of the writ. . . ." Judiciary Act of 1789, 1 Stat. 79 (1789).

55. The provision allowed the federal courts to take jurisdiction when ". . . the suit is between a citizen of the State where suit is brought, and a citizen of another State." Judiciary Act of 1789, 1 Stat. 79 (1789).

56. 18 Stat. 470 (1875). The provision gave the federal courts jurisdiction of controversies ". . . between citizens of different states. . . ."

57. The venue provision allowed a defendant to be sued in the "district . . . whereof he is an inhabitant, or in which he shall be found. . . ." Judiciary Act of 1875, 18 Stat. 470 (1875).

58. See *Miller v. Eastern Oregon Gold Mining Co.*, 45 Fed. 345, 347 (C.C.D. Ore. 1891).

59. The venue provision reads ". . . where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of either the plaintiff or the defendant." Judiciary Act of 1887, 24 Stat. 552 (1887) as corrected by Judiciary Act of 1888, 25 Stat. 434 (1888).

60. 18 CONG. REC. 2545 (1887) (remarks of Senator Hoar).

61. The general diversity jurisdiction venue provision provides that action may be brought ". . . only in the judicial district where all plaintiff's or all defendant's reside." 28 U.S.C. § 1391(a) (1958).

62. *Freiday v. Cowdin*, 83 F. Supp. 516, 518 (S.D.N.Y. 1949).

state in districts where it is licensed to do business or is doing business, since in all likelihood a corporation will be able to sue in a greater number of districts than a natural plaintiff. This criticism of the *Freiday* multi-venue option position, however, does not seem acceptable. The *Freiday* multi-venue option position looks beyond the mere numerical inequality of a natural person's and a corporation's venue options. It faces the reality that there is a need to equate the plaintiff corporation with natural plaintiffs and defendants and defendant corporations, by allowing venue to be proper where a litigant's economic or other activity is probably greatest; in the case of a natural plaintiff or defendant the district where he lives, and in the case of a plaintiff or defendant corporation the district or districts where it is licensed to do business or is doing business.

In interpreting venue provisions the federal courts recognize that Congress designs venue provisions to fulfill certain objectives. While the initial congressional restriction of diversity jurisdiction venue provisions was to eliminate the inconvenience to which a defendant might be subjected if he was amenable to suit wherever he was found,⁶³ defendant convenience has not been the sole objective in venue provisions. Considering the probable location of records, transportation costs, and other related matters, plaintiff and witness conveniences have also been recognized as objectives in formulating venue provisions.⁶⁴ Since Congress recognizes plaintiff and witness conveniences as legitimate venue objectives it would seem that a court should construe the latent ambiguity of section 1391(c) to allow the maximum flexibility in plaintiff corporate venue. State venue provisions that allow a plaintiff to sue where he is doing business may be justifiably subject to criticism on the grounds that this type of venue provision serves plaintiff convenience and disregards defendant and witness convenience.⁶⁵ In diversity jurisdiction litigation, however, not only will plaintiff convenience be served, but in many situations witness and possibly defendant convenience will be served by accepting the *Freiday* multi-venue option position.⁶⁶

A further reason for accepting the *Freiday* multi-venue option posi-

63. See, *Miller v. Eastern Oregon Gold Mining Co.*, 45 Fed. 345, 347 (C.C.D. Ore. 1891).

64. See *Lesnick v. Public Industrials Corp.*, 144 F.2d 968, 977 (2nd Cir. 1944); *Cohen v. Commodity Credit Corp.*, 172 F. Supp. 803, 808 (W.D. Ark. 1959); *Jacobson v. Indianapolis Light & Power Co.*, 163 F. Supp. 219, 223 (N.D. Ind. 1958); *Richard v. Franklin County Distilling Co.*, 38 F. Supp. 513, 516 (W.D. Ky. 1941).

65. See Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307, 313 (1951).

66. The *Davenport* case was instituted in Iowa, where the plaintiff corporation was doing business, to have adjudication ". . . near the physical location of witnesses, whose presence at the trial would be necessary to establish all the facts." Communication to the INDIANA LAW JOURNAL from Mr. Frank Davis, attorney for the plaintiff, Chicago & N.W. Ry.

tion is to maintain the flexibility and usefulness of the change of venue motion in section 1404(a) of the Judiciary and Judicial Procedure Code of 1948.⁶⁷ Under this change of venue provision district courts are given the power to weigh the respective conveniences of the parties and the witnesses and to transfer an action to a more convenient forum. This district court power, however, has been severely limited by the Supreme Court in *Hoffman v. Blaski*.⁶⁸ The Court held that the only proper transferee districts on a change of venue motion were those in which a plaintiff could initially have made a valid service of process and laid proper venue, independent of any desire on the part of the defendant to waive objections to improper venue and personal jurisdiction.⁶⁹

The limitation on change of venue, in conjunction with the *Davenport* single-venue option position on section 1391(c), would, in many instances, serve to make the most logical and convenient forum for adjudication an improper transferee forum. For example, in the *Davenport* case there seemed to be, in addition to valid plaintiff conveniences, definite witness conveniences that would make the most convenient forum for litigation the Iowa district in which the Wisconsin corporation was doing business.⁷⁰ But, if the plaintiff corporation had initially laid venue in another district and there was a motion by either party to transfer the action to the Iowa district, a court accepting the *Davenport* single venue option position would deny the motion. Under the *Hoffman v. Blaski* change of venue position, venue would initially have been improper in the Iowa district.

Often, if a defendant is a natural person or a corporation doing business only in its incorporating state, the conjunctive restriction of *Hoffman v. Blaski* and the *Davenport* single venue option position would make it impossible to use the change of venue motion of section 1404(a). For example, while a plaintiff corporation doing business outside its state of incorporation could get a valid service of process against a natural person under a state non-resident motorist statute, the *Davenport* single venue option position would make venue improper in a forum where the corporation was only doing business. The only alternative for the corporation would be to sue in the defendant's residence, since the venue would be proper⁷¹ and a valid service of process could probably be obtained.⁷²

67. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1958).

68. 363 U.S. 335 (1960).

69. The Court based its decision on the necessity to give content and meaning to the words *where it might have been brought*. *Id.* at 344.

70. See note 66 *supra*.

71. See 28 U.S.C. § 1391(a) (1958).

72. See FED. R. CIV. P. 4(d) (1).

Once suit is brought in the defendant's residence, even though overwhelming convenience considerations may point to a transfer to the district in which the cause of action arose, a court, accepting the *Davenport* single venue option position and bound to *Hoffman v. Blaski*, would be unable to transfer the action to any other district. The court would be faced with improper venue in the district in which the cause of action arose, lack of personal jurisdiction in the corporation's incorporating state, and both improper venue and lack of personal jurisdiction in any other district in which the corporation was licensed to do business or was doing business. This type of result, which makes the section 1404(a) change of venue motion useless, not only illustrates a failure to consider valid plaintiff and witness conveniences, but seems to support an invalid assumption that it is always most convenient for a defendant to be sued in his residence. It is just as logical to assume that a defendant would desire litigation near the physical location of his witnesses, and if an accident occurred in another state it is unlikely that the defendant's witnesses will be located at the defendant's residence.⁷³

Hoffman v. Blaski has limited the usefulness of the section 1404(a) change of venue motion in diversity jurisdiction litigation. If the flexibility of venue is further restricted by a rejection of the *Freiday* multi-venue option position many cases will arise in which a court will have to disregard all the litigant and witness convenience considerations.

A further reason for accepting the *Freiday* multi-venue option position can be based on the need to supplement, rather than restrict, the personal jurisdiction of the federal district courts. Since the district courts can use state service of process provisions under Federal Rule 4(d)(7),⁷⁴ their personal jurisdiction over non-resident defendants has been greatly expanded as a result of (1) the Supreme Court's "enlightened rationale,"⁷⁵ expanding the permissible scope of state jurisdiction over non-resident defendants doing acts within a state,⁷⁶ and (2) the increasingly comprehensive state non-resident jurisdictional provisions.⁷⁷ While the expan-

73. See generally note 66 *supra*.

74. Any competent adult individual, domestic or foreign corporation, or partnership or other unincorporated association which is subject to suit under a common name may be served with a summons and complaint ". . . in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state." FED. R. CIV. P. 4(d)(7); *but cf.* the accompanying note, *Erie v. Tompkins and Federal Determinants of Place of Trial*.

75. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 672 (1953) (Separate opinion of Burton, J.). See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *but cf.* the accompanying note, *A Reconsideration of "Long-Arm" Jurisdiction*.

76. See *McGee v. International Life Ins. Co.*, *supra* note 75, at 222.

77. *E.g.*,

(1) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby

sion has been limited by requiring acts of non-residents within a state to be of enough significance to make subsequent adjudication in the local and federal district courts of the states equitable,⁷⁸ the expansion has raised a federal venue issue which is relevant to the present controversy over section 1391(c).

The venue issue arose upon the contention that since the typical state jurisdictional statute provided that a non-resident motorist negligently causing an accident within the state appoints the Secretary of State as his agent to receive service of process, the non-resident waived his right to object to improper federal venue.⁷⁹ This contention, however, was rejected in *Olberding v. Illinois Cent. R.R.*⁸⁰ in which a non-resident driving in Kentucky ran his vehicle into a railroad overpass and sufficiently damaged the overpass to cause a subsequent train derailment. The Court held that while the defendant could be subjected to the jurisdiction of either the state or federal courts of Kentucky, the defendant by his acts had neither actually or impliedly consented to be sued within the state and, therefore, had not waived his federal venue rights. This result is relevant to the present section 1391(c) controversy, since it is now necessary for a plaintiff corporation using a non-resident jurisdiction statute to show that it is a resident of the federal district in which it brings an action. If the *Freiday* multi-venue option position is rejected, plaintiff corporations will not be able to use non-resident jurisdictional statutes in districts outside of their state of incorporation in which they are licensed

submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any said acts: (a) The transaction of any business within this State; (b) The commission of a tortious act within this State; (c) The ownership, use, or possession of any real estate situated in this State; (d) Contracting to insure any person, property, or risk located within this State at the time of contracting.

ILL. ANN. STAT. Ch. 110 § 17 (Smith-Hurd 1956); see WISC. STAT. ANN. § 262.05 (Supp. 1961); see generally the accompanying note, *A Reconsideration of "Long-Arm" Jurisdiction*.

78. This result is obtained by the requirements of acts within a state and notice sufficient to satisfy the due process requirements of the fourteenth amendment. See *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957); *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945); *Henry L. Doherty & Co. v. Goodman*, 294 U.S. 623 (1935); *Hess v. Pawloski*, 274 U.S. 352 (1927); *Sugg v. Hendrix*, 142 F.2d 740 (5th Cir. 1944); *Compania De Astral, S. A. v. Boston Metals Co.*, 205 Md. 237 (1954); *cert. denied* 348 U.S. 943 (1955).

79. *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953). The applicable statute in the *Olberding* case was Ky. REV. STAT. §§ 188.020-188.030 (1953). It had been held that a statute similar to Kentucky's did not violate the fourteenth amendment. *Hess v. Pawloski*, *supra* note 78. Non-resident motorists statutes generally (1) provide for implied appointment of a state official to receive service of process as the defendant's agent, when the defendant is driving in the state, (2) provide for service of process by registered mail and (3) require the defendant's return receipt before there is personal jurisdiction of the defendant. See Ky. REV. STAT. *supra*.

80. *Supra* note 79.

to do business or are doing business. This result would, in effect, prohibit a plaintiff corporation's use of a legitimate means to bring an action in a logical and convenient federal court. In all likelihood the defendant's acts which give rise to non-resident jurisdiction will occur in the districts in which plaintiff corporations carry on economic activity—the districts in which they are licensed to do business or are doing business—and not solely on their incorporating state.

Although the plaintiff railroad in *Olberding v. Illinois Cent. R.R.*⁸¹ was doing business in Kentucky, there was no claim that section 1391(c) made venue proper. The Court, however, indicated that it might be un-receptive to the *Freiday* multi-venue option when it said: "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."⁸² There is no indication whether the Courts was referring merely to general venue concepts or specifically to section 1391(c), but if the reference was directed at section 1391(c) it is suggested that the Court's statement is unwise. Section 1391(c) is not clear. It is ambiguous and susceptible to diverse interpretations and should be interpreted to supplement, rather than to limit, a method of service of process that often places the litigants in the most convenient forum for adjudication. Perhaps it would be best for Congress to enact a venue provision which would make venue proper in a district "in which the wrongful act, or part thereof occurred,"⁸³ but since it has not it would seem proper for a federal court faced with a legitimate venue ambiguity to judicially reach that result. If there are defendant or witness conveniences that override adjudication in the forum in which the cause of action arose, the section 1404(a) change of venue motion would seem sufficient to protect the defendant's interests.⁸⁴

Criticism has been leveled at the *Freiday* multi-venue option position on the grounds that it will encourage plaintiff corporations to forum shop in order (1) to seek favorable conflict of laws rules,⁸⁵ favorable state statutes of limitation,⁸⁶ and favorable state public policy,⁸⁷ and (2) to

81. 346 U.S. 338 (1953).

82. *Id.* at 340.

83. Barrett, *Venue and Service of Process in Federal Courts*, 7 VAND. L. REV. 608, 628 (1954). See generally Stevens, *supra* note 65, at 333.

84. For a discussion of the grounds for transfer under the change of venue motion of 28 U.S.C. § 1404(a) (1958); see 1 MOORE, FEDERAL PRACTICE § 0.145 [5] (1960).

85. A federal court, in any diversity jurisdiction action, must apply to the conflict of law rules of the state within which it is sitting. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

86. A federal court must, in any diversity jurisdiction action, apply the statute of limitations of the state within which it is sitting. *Moore v. Illinois Cent. R.R.*, 312 U.S. 630 (1940). A state's laches policy must also be applied by a federal court. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

harass the defendant by laying venue far from his residence.⁸⁸ The first criticism, however, is invalid when the *Hoffman v. Blaski* change of venue limitation and the *Davenport* single venue option position combine to limit adjudication of a diversity jurisdiction action to the defendant's residence, and the cause of action arose in another district. It is just as likely that by restriction in choice of forums a defendant's own state would have conflict of laws rules, statutes of limitation, and public policy which would be more favorable to the plaintiff than the state law which would apply in the forum where the cause of action arose. This criticism, therefore, seems to be one that should be aimed at diversity jurisdiction in general,⁸⁹ rather than at the *Freiday* multi-venue option position. The possibility of favoring one litigant over the other is a result of the district courts being bound to apply the law of the state within which they are sitting and not a result of restrictive or liberal venue provision. If, however, a plaintiff corporation attempts to forum shop, either to harass the defendant or to seek favorable state law, the defendant would seem adequately protected since (1) the plaintiff must have a valid service of process on the defendant in any forum where suit is brought⁹⁰ and (2) the plaintiff will be subjected to added expense in litigation and delay in judgment if the defendant seeks a change of venue under section 1404(a).⁹¹

V

The *Freiday* multi-venue option position is a unique solution to the difficulty created by the 19th century corporate venue choice that limited corporate residence to a corporation's state of incorporation. A court that rejects that position would seem to be overlooking the change that

87. A federal court must, in any diversity jurisdiction action, apply the public policy of the state within which it is sitting. *Griffin v. McCoach*, 313 U.S. 498 (1941).

88. These two criticisms were presented in Comment, *The Corporate Plaintiff and Venue Under Section 1391(c) of the Judicial Code*, 28 U. CHI. L.R. 112, 120 (1960). A third criticism was leveled at § 1391(c) on the grounds that it would cause plaintiff corporations to seek districts in which juries are reputed to give large recoveries. *Ibid.* However, since large jury awards have not been considered as grounds for a change of venue, the criticism appears to have no merit as applied to the *Freiday* multi-venue option position on § 1391(c). See *Chicago R.I. & P. Ry. v. Igo*, 280 F.2d 110 (8th Cir.) ; *cert. denied* 350 U.S. 822 (1955).

89. The laws of a state must be applied by federal courts in diversity jurisdiction litigation. 28 U.S.C. § 1652 (1958). The application of state law in diversity jurisdiction has been extended to include the common and equity law of a state. See *Erie Ry. v. Tompkins*, 304 U.S. 64 (1938) ; *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202 (1938).

90. A defendant can object to adjudication on the grounds of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. FED. R. CIV. P. 12 (b).

91. See, 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 80, 388 (1960) ; Barrett, *supra* note 83, at 617.

has taken place in the relationship of the corporation and its state of incorporation. Today many corporations do not engage in any economic activity within their state of incorporation and the state serves only as a depository for incorporation papers and as a franchise tax recipient. The *Freiday* multi-venue option position diminishes the effect of this contemporary corporate situation and affords the plaintiff corporation venue options based on contemporary economic activity, not 19th century economic activity. It would seem that inherent in the *Freiday* multi-venue option position is the realistic recognition that corporate residence is not subject to the physical limitations that restrict the natural plaintiff's or defendant's venue residence to a single forum. In addition to affording contemporary plaintiff corporations realistic venue choices, the *Freiday* multi-venue option position accomplishes at least two other desirable ends. First, it allows a corporation federal use of non-resident jurisdiction statutes outside its state of incorporation in districts in which it is engaging in economic activity and such a statute is most likely to be useful. Second, it affords a district court a better opportunity to make a meaningful application of the recently restricted section 1404(a) change of venue motion, because by numerically increasing the number of plaintiff corporate venue choices it is likely that the number of proper transferee forums will also be increased. If Congress did not intend for corporations to be able to lay proper venue in districts in which they are incorporated, licensed to do business or are doing business, it can clarify its intent by statutory amendment.